

1 DOWNEY BRAND LLP  
2 WILLIAM R. WARNE (Bar No. 141280)  
3 MICHAEL J. THOMAS (Bar No. 172326)  
4 MEGHAN M. BAKER (Bar No. 243765)  
5 555 Capitol Mall, Tenth Floor  
6 Sacramento, CA 95814-4686  
7 Telephone: (916) 444-1000  
8 Facsimile: (916) 444-2100  
9 bwarne@downeybrand.com  
10 mthomas@downeybrand.com  
11 mbaker@downeybrand.com

12 Attorneys for Defendants LENNOX HEARTH  
13 PRODUCTS INC.; LENNOX INTERNATIONAL INC.;  
14 SUPERIOR FIREPLACE COMPANY

15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA

17 KIRK KEILHOLTZ and KOLLEEN  
18 KEILHOLTZ for themselves and on behalf  
19 of those similarly situated,

20 Plaintiffs,

21 v.

22 SUPERIOR FIREPLACE COMPANY;  
23 LENNOX HEARTH PRODUCTS INC.;  
24 LENNOX INTERNATIONAL INC. and  
25 DOES 1 through 25, Inclusive,

26 Defendants.

Case No. 3:08-cv-00836-SI

**[PROPOSED] ORDER GRANTING  
MOTION TO DISMISS UNDER FEDERAL  
RULES OF CIVIL PROCEDURE 9(b) AND  
12(B)(6)**

Date: August 11, 2008

Time: 9:00 a.m.

Courtroom: 10

Judge: Susan Illston

Complaint Filed February 6, 2008

27 Defendants Lennox Hearth Products Inc. and Lennox International Inc. ("Defendants")  
28 have moved to dismiss the Complaint filed by Plaintiffs Kirk and Kolleen Keilholtz ("Plaintiffs")  
under Federal Rules of Civil Procedure 9(b) and 12(b)(6). Having read and considered all papers  
supporting and opposing the Motion, Court **HEREBY GRANTS** the Motion as follows:

1. Plaintiffs have asserted claims for (1) violation of California Business and  
Professions Code section 17200 ("UCL"), (2) violation of the Consumer Legal Remedies Act  
("CLRA"), and (3) unjust enrichment. The Court hereby dismisses these three claims without  
prejudice on the grounds that Plaintiffs have failed to plead the fraudulent misrepresentations and

1 false advertisements alleged in their Complaint with particularity, as required by Federal Rule of  
2 Civil Procedure Rule 9(b).

3 2. The Court dismisses the CLRA claim with prejudice on the grounds that Plaintiffs  
4 have not and cannot allege sufficient facts to demonstrate that they complied with the pre-lawsuit  
5 notice requirements of the CLRA.

6 3. The Court dismisses the CLRA claim with prejudice on the grounds that Plaintiffs  
7 have not and cannot allege facts demonstrating that Defendants engaged in a “transaction” with a  
8 “consumer” as required by the CLRA.

9 4. The Court dismisses with prejudice the UCL claim asserted by those putative class  
10 members who own a home in which a fireplace was installed more than four years before the  
11 filing of this action on the grounds that such claim is barred by the statute of limitations.

12 5. The Court dismisses with prejudice the CLRA and unjust enrichment claims  
13 asserted by those class members who own a home in which a fireplace was installed more than  
14 three years before the filing of this action on the grounds that such claims are barred by the statute  
15 of limitations.

16 **IT IS SO ORDERED.**

17  
18 DATED: \_\_\_\_\_

SIGNED: \_\_\_\_\_

JUDGE OF THE UNITED STATES  
DISTRICT COURT